

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	Criminal No. 3:04-CR-059-D
VS.	§	
	§	
EDWIN T. McBIRNEY, III,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION
AND ORDER

Defendant Edwin T. McBirney, III (“McBirney”) moves the court pursuant to 18 U.S.C. § 3143(b) for release on bond pending appeal. For the reasons that follow, *see* Fed. R. App. P. 9(a)(1) and (b),¹ the court denies the motion.

Section 3143(b) provides that a defendant who has been found guilty of an offense and sentenced to a term of imprisonment *shall* be detained unless the judicial officer finds, *inter alia*, that the appeal raises a substantial question of law or fact.² A substantial question of law or fact is one that is nonfrivolous and novel, raising substantial doubt as to the outcome of its resolution, with the defendant required to show that a contrary appellate ruling would more probably than not result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a reduced sentence to a term of imprisonment less than the total of the time already served plus the

¹Under Rule 9(b), the court must comply with the requirements of Rule 9(a). Rule 9(a)(1) provides, in pertinent part, that the court must state in writing the reasons for an order regarding the detention of a defendant in a criminal case.

²The other elements of § 3143(b) are not pertinent. McBirney does not pose a danger to the community, and he is not prosecuting this appeal for purposes of delay. The court assumes *arguendo* that he does not present a risk of flight.

expected duration of the appeal process. *See* § 3143(b)(1)(B)(i)-(iv); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1022-25 (5th Cir. 1985).


To obtain release pending appeal, McBirney relies on two principal issues to contend that his appeal will result in reversal and possible dismissal of all or most of the charges against him and/or a new trial. These arguments were presented in his post-verdict motions, and the court rejected them in its August 21, 2006 memorandum opinion and order. *See United States v. McBirney*, 2006 WL 2432675 (N.D. Tex. Aug. 21, 2006) (Fitzwater, J.). For the reasons set out in that memorandum opinion and order, which the court applies in full to the present decision, the court holds that McBirney has not demonstrated a substantial question of law or fact under the standard explained in *Valera-Elizondo*.

* * *

McBirney's October 17, 2006 motion for release on bond pending appeal is denied.

SO ORDERED.

October 25, 2006.


SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE